Supreme Court, U.S.
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No. 08-1327

IN THE

Supreme Court of the United States

LINDA HARRIS-BRUNSON,

Petitioner,

—v.—

JAMES JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

LINDA HARRIS
1000 Peachtree Industrial Boulevard
Suite 6-123
Suwanee, Georgia 30024
(678) 710-5625

Petitioner Pro Se

QUESTIONS PRESENTED

The questions presented are:

1. Did the trial judge err by not scheduling a hearing within a reasonable timeframe "as stated in the Order Transferring *Case Findings of Fact* in respect to jurisdiction Complaint For Grandparents' Visitation Rights"?

2. Did the trial judge err by stating in the Order Transferring *Conclusions of Law* "that neither the child nor the child's parents or any person acting as a parent has a significant connection with the state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships OR until it determines that neither the child nor the child's parents or any person acting as a parent resides in this state"?

3. Whether the Fourteenth Amendment's Due Process Clause is violated when a court did not order grandparent visitation and whether Petitioner was improperly and unfairly prejudiced by the admission of evidence presented.

4. Can this Court review issues about constitutional rights that the state court have never addressed or decided, and that are currently before a state trial court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Linda Harris, respectfully petition for a writ of certiorari to review the decision and order of the Superior Court of Gwinnett County State of Georgia in this case.

OPINIONS BELOW

The decision of The Supreme Court of Georgia, S08C1612, entered its judgment on September 22, 2009 is attached to the Appendix as **"1A"**. The decision of The Court of Appeals, A08D0339, entered its judgment on May 15, 2008 is attached to the Appendix as **"5A"**. The Superior Court of Gwinnett County State of Georgia, *Harris-Brunson v. Jenkins*, et al, 06-A-06158-2, entered its judgment on March 19, 2008 is attached to the Appendix as **"2A"**.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia entered its judgment on September 22, 2008. Petitioner shows that the jurisdiction is properly in this Court. Jurisdiction of the United States Supreme Court pursuant to Supreme Court Rule 10 (hereinafter, "Rule 10").

Rule 10 provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons and special and important reasons therefore." Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has

not been, but should be settled by this Court..." Supreme Court Rule 10(c).

This Court has the inherent power to act upon a petition for certiorari and render a fair decision; however, generally a party petitioning for a writ must be able to demonstrate that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals . . .
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [or]
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10. The Rule 10 criteria have not been met.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

If a parent of a married child is deceased, the grandparents of the deceased child may be granted reasonable visitation rights, by the court that would be in the best interest of the children. The court shall consider the amount of personal contact between the grandparents prior to the application.

STATEMENT

This is one of the most important cases ever to reach this Court, and resolution of the questions presented here will largely determine the future of other families in the future.

The Petitioner Linda Harris is the maternal aunt of Jaylen and Javon Jenkins and twin sister of Lynn Jenkins and is seeking grandparent visitation rights for her parents James Harris Jr. and Margaret J. Harris.

Six years after the U.S. Supreme Court curbed grandparents rights in child-visitation disputes. In 2006 there were three court rulings by state supreme courts suggest that those who go to court seeking more time with their grandchildren are gaining ground.

The rulings in Pennsylvania, Utah, and Colorado in favor of grandparents who sought visitation despite the objections of a child's parent

indicate that courts increasingly are sympathizing with grandparents – particularly in cases involving the death of a parent or another family tragedy.

State judges generally were inclined to deny grandparents' petitions for visitation in the years after the ruling. However, as many states revisited their laws and grandparents' claims have risen to state high courts, it has become clear that grandparents can win visitation over a parent's objection in special circumstances, such as the death of the other parent.

In each of the cases, the surviving parent's fitness to care for the child was not in question. Yet the courts rejected arguments from the parents that they should control visitation and generally focused on the "best interests" of the grandchild.

In a Pennsylvania case involving an 11-year-old boy whose mother died of cancer, the state's Supreme Court ruled August 22, 2006 that the boy's father could not limit the maternal grandmother's visits to one day a month. The father's lawyer had argued that when a parent has not been found to be unfit, judges should not interfere with visitation limits unless a grandparent shows the limits would harm the child.

The Pennsylvania case revolved around Fausey, and whose mother, Stephanie, died in May 2002 of cancer. Kaelen's father, Shane, then "abruptly denied" the grandmother contact with Kaelen, according to the court. In rejecting Fausey's appeal, the state high court note that "grandparents have assumed increased roles in their grandchildren's lives, and our

cumulative experience demonstrates the ... benefits of ... intergenerational ties." The court also emphasized that Pennsylvania's visitation rights to grandparents whose child had died.

In a Utah case involving a 10-year-old girl who lived with her maternal grandparents after her mother died suddenly of an illness, the state Supreme Court upheld on August 25, 2006 a statute that allowed continued grandparent visitation. The court rejected a claim by the girl's father, who said the law violated his right to make decisions on behalf of his child.

In a Colorado case involving a boy who lost both his parents by age 5 and was adopted by a maternal aunt and uncle, the state's high court ruled June 26, 2006 that paternal grandparents could make a case for visitation even though they could not prove that denying visitation would harm the child. Colorado's Supreme Court reversed a lower court's ruling that required a grandparent to prove a parent's restriction "poses actual or threatened emotional harm to the child."

On October 11, 2005 The Ohio Supreme Court sided with maternal grandparents who wanted to visit there granddaughter, but were challenged by the girl's father. The Ohio law says that in cases where a parent of an unmarried minor dies, courts may grant grandparents and other relatives of the deceased parent visitation rights if those visits are deemed "in the best interest" of the child.

Each of the fifty States allows grandparents to seek court-ordered visitation with their grandchildren and thereby obtain judicial review of even a fit parent's decision to deny or limit visitation. See App., *infra*, 87a-108a. State courts of last resort are deeply divided as to whether a fit parent's federal constitutional right to make decisions regarding the care, custody, and control of his or her child requires that a grandparent demonstrate actual or potential harm to the child before a court may order custody or visitation over the parent's objection.

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), seven Justices recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 68 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). Justice O'Connor's plurality opinion—joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer—concluded that the State of Washington's Grandparent Visitation Statute was unconstitutional as applied to override a fit mother's decision to limit her daughter's paternal grandparents to monthly visits with the child following the father's suicide. *Id.* at 60-61, 73. The plurality noted the "sweeping breadth" of the Washington statute, *id.* at 73, and the failure of the Washington courts to accord "special weight" to the mother's decision and to apply "the traditional presumption that a fit parent will act in the best interest of his or her child," *id.* at 69. The plurality expressly left unanswered "whether the Due Process Clause requires all nonparental visitation statutes to

include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73.

Justice Souter concurred in the judgment. He reasoned that the Washington statute was facially unconstitutional because it authorized "'any person' at 'any time' to petition and receive visitation rights subject only to a free-ranging best-interests-of-the-child standard." *Troxel*, 530 U.S. at 76-77. Justice Thomas also concurred in the judgment, agreeing that "this Court's recognition of a fundamental right of parents to direct the upbringing of their child resolves this case." *Id.* at 80. Justice Thomas explained that strict scrutiny should apply to the custody order, concluding that "Washington lacks even a legitimate state interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Ibid.*[1]

The federal constitutional question left unanswered by *Troxel* continues to divide the States.

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[1] Justices Stevens, Scalia, and Kennedy dissented in separate opinions. Noting that the Washington Supreme Court had found the state statute facially unconstitutional, Justice Stevens would have remanded for further review on the ground that the statute could have a "plainly legitimate sweep" despite applying to "any person" petitioning at "any time" and not requiring a showing of actual or potential harm in every case. *Troxel*, 530 U.S. at 85. Justice Kennedy dissented along similar lines, writing that he would remand for further review the state court's facial invalidation of state law because the best-interests-of-the-child standard might be appropriate in some third-party visitation cases. *Id.* at 94. Justice Scalia argued that the right of parents to direct the upbringing of their children is an unenumerated right not enforceable by "[j]udicial vindication." *Id.* at 91-92.

As detailed below (*infra* pp. 11-21), twelve States prohibit courts from ordering grandparent visitation absent a showing of actual or imminent emotional or physical harm to the health or welfare of the child, whereas eleven States permit court-ordered custody or visitation, over a fit parent's objection, without requiring such a showing. See also App., *infra*, 87a-110a.

That conflict has important implications for a fit parent's fundamental right to make childrearing decisions. In jurisdictions where the Due Process Clause is read to require a showing of harm, the parent-child relationship remains free from state interference unless a court is satisfied that intervention is necessary because "the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm." *Roth* v. *Weston*, 789 A.2d 431, 445 (Conn. 2002). In those States, "[t]he fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003).

In States where grandparents need not demonstrate any risk of harm to the child to gain court-ordered custody or visitation, a judge may override the parent's presumptively valid decision whenever the court disagrees with the parent's decision and concludes that additional contact with a grandparent would be in the child's "best interests." See, *e.g. Brandon L.* v. *Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (upholding a visitation order "in the best

interest of the children and [that] will not substantially interfere with the parent-child relationship"). In stark contrast to the "harm to the child" standard, the "best interests" standard sets a relatively low and notoriously vague bar. See *Troxel*, 530 U.S. at 75 (Souter, J., concurring) (criticizing "a free-ranging best-interests-of-the-child standard"); *id* at 101 (Kennedy, J., dissenting) (noting criticism of the best interests standard as indeterminate)."

In the decision below, the Georgia Supreme Court did not require a showing of actual or potential harm to the child before ordering, over the fit parent's objection, that a grandparent was entitled to take overnight custody of a child for one weekend a month and one week each summer. App., *infra*, at 25a-26a. While recognizing that a number of its sister States hold that the Due Process Clause requires such a showing, *id.* at 22a-23a & n.21, the Georgia Supreme Court noted that the *Troxel* Court "refused to determine" the question, *id.* at 22a, and therefore held that the federal Constitution did not require a grandparent to demonstrate that court-ordered partial custody is necessary to avoid harm to the child."

A. The Trial Court Proceedings

James and Lynn Jenkins were married on August 1998. In 2003, they sought reconciliation in their marriage by attending therapy sessions. In 2003 Lynn Jenkins was informed that she had cancer, and on 2004 she moved to the State of Georgia to seek "chemo-therapy treatment" there on account of the better weather.

A two year custody battle then ensued, and finally Georgia was designated the children's home state and the trial judge found by written order filed on September 5, 2006 that "Georgia was the home state of the children on the date of the commencement of the hearing."

Jaylen and Javon Jenkins were the only two children of James and Lynn Jenkins. Jaylen was born on October 18, 1998 and Javon on May 16, 2000 and lived with their mother and grandmother, Margaret Harris for a period of time until their mother Lynn Jenkins died of cancer on June 17, 2006 at the Atlanta Medical Center in Atlanta, Georgia.

The children were attending schools in Georgia. Javon attended Riverside Elementary School (2005-2006) and Jaylen attended B.B. Harris Elementary School (2004 – 2006). Last date of school attendance was September 5, 2006. Jaylen attended B.B. Harris as a special needs student. From a baby he had hearing and speech problems and needed help with his speech. He had to get tubes in his ears. Petitioner was then taking care of the children until September 5, 2006.

On June 26, 2006, the Petitioner filed a Motion For Expedited Hearing and a Complaint for Determination of Child Custody Civil Action in The Superior Court of Gwinnett County, State of Georgia.

On August 5, 2006, following an off-the-record conference, with the trial judge and Mr. Dougherty, the Respondent's out-of-state counsel regarding

custody the Petitioner nor my attorney where not presented for the conference call. After that conference call, the trial judge issued temporary custody to the Respondent and granted unsupervised custody of Jaylen and Javon without any contact to the grandparents. Petitioner objected and was denied.

The Petitioner filed a motion to reconsider which the trial judge has never considered. Petitioner explained to the court her concerns regarding Respondent's unsupervised visitation, were based, in part, on past instances and concerns about the level of supervision and again the trial judge showed no concerned.

That afternoon the trial judge moved the case from September 13, 2006 to September 5, 2006 and told my attorney that the children must be at the hearing. We later found out the trial judge office was in direct contact with the Respondent's out-of-state attorney without the Petitioner knowledge.

The Respondent's lawyer stated that "his client was very upset because he said he could not come back because he had to work and he needs to get back to work". A faxed confirmation was also sent to the Petitioner's attorney confirming these facts. On September 1, 2006 an Order Scheduling Hearing was issued by trial judge. The Respondent's out-of-state attorney then calls the trial judge directly and states his client cannot jeopardize his position by coming back to Georgia the trial judge allows this behavior and again ignores the law and allows him to sends numerous of letters and not follow proper procedures.

Rule 4.4(D) (1) of the Uniform Superior Court Rules states: "An eligible Domestic Lawyer seeking to appear in a proceeding in this state as counsel *pro hac* vice shall file a verified application with the Court where litigation is filed. The application shall be served on all parties who have appeared in the case and the Office of General Counsel of the State Bar of Georgia. The application shall include proof of service...." The United States District Court, Northern District of Georgia *never* issued an Order of Admission to Mr. Dougherty granting him *pro hac vice.*

B. The Court of Appeals of The State of Georgia Court Decision

Petitioner timely appealed the trial court's order, continued to argue but was denied her due process.

C. The Supreme Court of The State of Georgia Court Decision

This case turns on the question left unanswered The Supreme Court of Georgia. The Petitioner petitioned The Supreme Court of Georgia and was denied on September 22, 2008.

REASONS FOR GRANTING THE PETITION

The health and welfare of the children will be harmed unless such visitation is granted because the relationship between the grandparents and the children was well established and the absence of the relationship will be detrimental to the children's psychological and emotional well being.

Grandparents provide a stabilizing force in times of family crises. Research indicates that grandparents contribute to child development by...; socializing with grandchildren; giving financial and emotional support; passing history, values and traditions to grandchildren.

Relations with grandparents add qualitative and quantitative dimensions to the pool of adult role models available to children. Researchers have found that the unconditional love that grandparents bestow upon grandchildren, aids in their self-esteem and efficacy. The best interest of the children will be served by such visitation because it is in their best interest to have a continuing and nurturing relationship with their grandparents.

The children have had an abiding and a very close relationship with their grandparents throughout their life. The grandparents missed them because they spent quality time with Jaylen and Javon while growing up and would like to continue the loving caring environment that the children were accustomed too because of their deep love for them.

In behalf of Jaylen and Javon, they were taught Bible stories that would enhance their thinking and build strong character. Some memorable times spent with them was playing games, saying their prayers at night and their listening to the night-night songs for them to have a pleasant sleep. Their beds were surrounded by stuff animals and some toys. They enjoyed playing airplane, going to the park, riding their bikes, playing with JJ the dog and many more

outdoors activities. Their teachers loved them and they had many young friends.

Besides losing their Mother in death they lost others too such as their great grandmother Harris they visited in California and their great grandmother Bumbry, Jaylen was a baby when she died. They also lost their great grandfather Harris and their Aunt Marilyn Cotman (who both have passed away without them knowing).

They loved visiting there grandfather Harris, great grandfather Harris, and loving family (Uncles, Aunts & cousins) spending quality time with family such as, playing in the yard, riding the train, going on a boat ride, talking and bonding with family.

Jaylen and Javon were taught to show love, respect and show kindness to people. Our family would love to bond with them and would like to continue a loving relationship with them because of our deep love for them. We also would like as a family for the court to show mercy and compassion for our great lost of seeing Jaylen and Javon.

Petitioner asked trial court to reconsider its earlier denial of petitioner's plea of jurisdiction in light of new evidence. However, the trial court declined to do, issuing its "Temporary Order" to Respondent on September 5, 2006. The trial court never ruled on Intervenor's Complaint For Grandparent's Visitation Rights is attached to the Appendix as **"7A"** as stated in the Order Transferring Case Findings of Fact Order.

When the trial court released its decision awarding temporary custody of Jaylen and Javon to their father, it also should have included in its judgment entry an order for grandparents visitation rights to the grandparents within its judgment of entry.

A. The Order from the Superior Court is Incorrect. The trial court erred in finding are not factual.

A court of this state has the jurisdiction to make an initial custody determination if this state was the home state of the children at the time of commencement of the action or was the home state of the children of the children within six month before the commencement of the proceeding. *O.C.G.A. § 19-9-61(a)(1)*. As it applies to this case, the "home state" is the state in which a child lived with a parent .... For at least six consecutive months immediately before the commencement of a child custody proceeding ... A period of temporary absence of [the child or part] is part of the period" *O.C.G.A. § 19-9-41(7)*. "A court of t his state shall treat a foreign country as if it were a state of the United States for the purpose of applying *O.C.G.A. § 19-9-60 et seq*.]. *O.C.G.A. § 19-9-44*.

Petitioner complained during the hearing, that the trial court could not properly proceed with a determination of child custody in this case unless the maternal grandparents had been given notice and opportunity to be heard in accordance with the standards of *O.C.G.A. § 19-9-47*. There is no evidence in the record of any attempts that this has been done.

Under *O.C.G.A. § 19-9-65(a)*, "[b]before a child custody determination is made under this article, notice and an opportunity to be heard in accordance with the standards of *O.C.G.A. § 19-9-47*, must be given to ... any person having physical custody of the child," "'Physical custody' means the physical care and supervision of a child" *O.C.G.A. § 19-9-41(7)*.

As set forth above, the child's maternal grandmother and maternal aunt resided in Georgia. They had been providing "physical care and supervision" of the parties' child in the six months prior to the commencement of this proceeding on September 6, 2006. Service of the process upon the children's maternal grandparents is an absolute prerequisite to jurisdiction of an initial custody determination of the proceeding. We are truly disadvantage ones. Our hearts are broken and in pain and distress.

Even though the Respondent is the rightful parent and we respect him as parent. The Respondent cannot denied or disallow grandparents visitations, shutting off grandparents access significantly impairs a child's physical health and emotional well-being and under the law it's not fair.

B. The States Are Deeply Divided As To Whether A Fit Parent's fundamental Right Under the Due Process Clause Of The Fourteenth Amendment Requires That A Grandparent Seeking Court-Ordered Visitation Over The Parent's Objection Must Demonstrate That Visitation Is Necessary To Avoid Harm To The Child

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), a majority of this Court recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 65 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). A plurality of the Court in *Troxel* determined that the Washington Grandparent Visitation Statute was unconstitutional as applied where a court awarded visitation rights to a child's paternal grandparents over the fit mother's objection. *Id.* at 75. Justice O'Connor, writing for the plurality, took issue with the Washington trial court's failure to accord "special weight" to the mother's "determination of her daughter's best interest," and the court's failure to apply "the traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69."

Justice O'Connor emphasized that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73. Justice

Souter and Justice Thomas wrote separate opinions concurring in the judgment. See *supra*, p. 3. The States are deeply divided on the question expressly left unanswered by the *Troxel* plurality: "whether the Due Process Clause requires" that all grandparent visitation statutes must "include a showing of harm or potential harm as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73. Nine states courts of last resort have answered that question in the affirmative, and three more have established the same rule by statute in response to *Troxel*. See *infra*, pp. 12-17. Eleven States have reached the opposite conclusion. See *infra*, pp. 18-19.

C. Twelve States Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Twelve States prohibit court-ordered visitation over a fit parent's objection absent a showing that denial of visitation would result in actual or potential harm to the child. In nine of those jurisdictions, the highest court of the State has interpreted the Fourteenth Amendment's Due Process Clause to require harm as a threshold showing, without which court ordered visitation is impermissible. *Linder* v. *Linder*, 72 S.W.3d 841 (Ark. 2002); *Roth* v. *Weston*, 789 A.2d 431 (Conn. 2002); *Brooks* v. *Parkerson*, 454 S.E.2d 769 (Ga.1995); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Blixt* v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003); *Williams* v. *Williams*, 501 S.E.2d 417 (Va. 1998); *In re*

Parentage of C.A.M.A., 109 P.3d 405 (Wash. 13 2005).[2] At least three States, in response to *Troxel*, have imposed a harm-based standard by statute to remedy federal constitutional infirmities in their respective laws. See 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006); Mich. Comp. Laws § 722.27b(4)(b) (2006); Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006).

The highest courts in those states have held that any lesser standard—requiring, for example, that the grandparent demonstrate merely that visitation would be in the best interests of the child—would afford inadequate "special weight" to the fit parent's determination of what is best for the child. See, *e.g.*, *Howard*, 661 N.W.2d at 192 ("There is nothing in [the

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[2] In at least four other States, including Maine, Mississippi, South Carolina, and Vermont, courts have declined to declare potential harm to the child to be the *sole* justification for state intervention, but they have held that only sufficiently "compelling" or "urgent" circumstances, such as harm to the child, will overcome the presumption in favor of the fit parent. *Rideout* v. *Riendeau*, 761 A.2d 291, 301 (Me. 2000) ("The natural right of a parent to the care and control of a child should be limited only for the most urgent reasons.") (quoting *Merchant* v. *Bussell*, 27 A.2d 816, 818 (Me. 1942)); *Stacy* v. *Ross*, 798 So. 2d 1275 (Miss. 2001) ("[F]orced, extensive, unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents."); *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003). ("The presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing compelling circumstances, such as significant harm to the child, if visitation is not granted.") (emphasis add); *Glidden v. Conley*, 820 A.2d 197 (Vt.203) holding that a mere "best interests" standard does not survive Troxel and requiring "evidence of compelling circumstances to justify judicial interference with the parent's visitation decision").

best interest standard] * * * that mandates the judge to give special weight to the parents' decision.").[3] Less compelling circumstances, those courts have explained, cannot justify "state intrusion on the [fit] parent's fundamental right" to make independent childrearing decisions. *Linder*, 72 S.W.3d at 858; see also *Howard*, 661 N.W.2d at 188. The Connecticut Supreme Court, for example, determined that "the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody [of the child] * * * namely, that the child is neglected, uncared for or dependent as those terms have been defined [by state statute]." *Roth*, 789 A.2d at 445 (internal quotation marks omitted). The Massachusetts Supreme Judicial Court similarly held that grandparents seeking visitation must "allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." *Blixt*, 774 N.E.2d at 1060.[4] The Virginia Supreme Court has

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[3] The Iowa Supreme Court acknowledged that harm may result "[w]hen a grandparent has established a substantial relationship with a grandchild" and that emotional bond is severed, but held that the harm must be "beyond that derived from the loss of a helpful, beneficial influence of grandparents." *Howard*, 661 N.W.2d at 191. The court suggested that a "substantial relationship" would be that "akin to a parental relationship." *Ibid.*

[4] The Massachusetts court suggested that disturbing a "child's preexisting relationship with a nonbiological parent" might itself constitute harm, *Blixt* 774 N.E.2d at 1060, but state appellate courtshave applied that holding to define more precisely the circumstances under which children are harmed, see, e.g., *Dearborn v. Deausault*, 808 N.E.2d 1253, 1256 (Mass. Ct. App. 2004) (holding that a relationship in which a grandparent saw a

even specified that harm to the health, "child's health or welfare" must be actual and not merely potential or likely. *Williams*, 501 S.E.2d at 418.

Those jurisdictions reject the notion that judicial intervention into a fit parent's childrearing decisions may be justified where a grandparent demonstrates merely that court-ordered visitation would be in the child's best interests. See, e.g., *Howard*, 661 N.W.2d at 192 ("The best interest standard is a doctrine that embraces the interests of children, and we have never interpreted it to protect the fundamental parenting interest or to provide a presumption for fit parents."). As the South Carolina Supreme Court reasoned: "The fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn*, 586 S.E.2d at 568. That is, proof that visitation would satisfy a judge's opinion of a child's "best interests" cannot overcome the "presumption that a fit parent's decision is in the best interest of the child." *Ibid.*

The New Jersey Supreme Court similarly held that a "best interests" standard fails to respect a parent's due process rights because "the avoidance of harm to the child" is "the only state interest warranting invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation

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child several times per month was "not the kind of relationship from which significant harm to the children may be inferred from disruption alone").

over the wishes of a fit parent." *Moriarty*, 827 A.2d at 222-223;8 see also *C.A.M.A.*, 109 P.3d at 410 ("'[T]he standard of best interest of the child is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.'") (quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998)).[5] In sum, those state high courts have determined that only proof that grandparent visitation is truly necessary to avoid harm—and not merely to incrementally benefit the child's wellbeing—adequately protects parents' fundamental rights from state intervention. See *Camburn*, 586 S.E.2d at 568.

State legislatures also have read *Troxel* to require that grandparents prove that denial of visitation will result in harm to the child where a fit parent objects to visitation. The Texas Legislature amended the State's grandparent visitation statute to provide that courts may order visitation only where the grandparent "overcomes the presumption that a parent acts in the best interest of the parent's child by proving * * * that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006) (emphasis

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[5]The New Jersey Supreme Court acknowledged that "the termination of a long-standing relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm." *Moriarty*, 827 A.2d at 224. State appellate courts have subsequently focused on the need for evidence of actual physical, mental, or emotional suffering and have interpreted the standard set forth in *Moriarty* to require more than the "loss of potentially happy memories." *Mizrahi v. Cannon*, 867 A.2d 490, 498 (N.J. Super. Ct. App. Div. 2005).

added); see also H. 79, Tex. B. Analysis, H.B. 261, Reg. Sess. (Tex. 2005) (explaining that the bill "[i]ncorporates the holding in *Troxel v. Granville*, 530 US 57 (2000)"); Tex. Att'y Gen. Op. No. GA-0260, 2004 WL 2326558, at *11 (Oct. 13, 2004) (recommending that, "to avoid an unconstitutional application of the [Texas grandparent visitation] statute" following *Troxel*, courts must require grandparents to prove that "denial of access by the grandparent would significantly impair the child's physical health or emotional wellbeing").

Likewise, the Illinois legislature amended its visitation statute in the wake of *Troxel* to require that grandparents demonstrate harm to the child before courts may order visitation rights over the decision of a fit parent. The House sponsor of the bill noted that the State's previous visitation statute "was too lenient" and had been invalidated in a series of decisions by the Illinois Supreme Court in light of *Troxel*.[6] Ill. H. Trans., H. 93-110, Reg. Sess., at 80 (2004). The new statute was "written with [those] Supreme Court decision[s] in mind" and, accordingly, replaced the "best interest of the child" standard with a "harm to the child" standard. Ill. S. Trans., S. 93-109, Reg. Sess. (2004). The amended statute specifies

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[6]Immediately following *Troxel*, the Supreme Court of Illinois sustained an as-applied challenge to the statutory provision that allowed grandparents to petition for court-ordered visitation over the objection of both parents. *Lulay Lulay*, 739 N.E.2d 521 (2000). In 2002, it held those statutory provisions *facially* unconstitutional because they failed to incorporate a presumption that fit parents acted in the best interests of their children. *Wickham* v. *Byrne*, 769 N.E.2d 1 (2002).

that "[t]he burden is on the [grandparent] * * * to prove that the parent's actions and decisions regarding visitation times are *harmful to the child's mental, physical, or emotional health*." 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006) (emphasis added).

The Michigan legislature also adopted a grandparent visitation statute containing a harm-based standard, Mich. Comp. Laws § 722.27b(4)(b) (2006), after the Michigan Supreme Court held the previous statute unconstitutional in the wake of *Troxel*. See *DeRose v. DeRose*, 666 N.W.2d 636 (Mich. 2003). The new statute codifies *Troxel*'s "presumption that fit parents act in the best interests of their children" by requiring that a grandparent prove that a parent's decision to deny visitation creates "a substantial risk of harm to the child." *Mich. S. Fiscal Agency B. Analysis*, S. 92, Reg. Sess. (2005) presenting the legislative history of the amended Child Custody Act).

D. Eleven States Do Not Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Pennsylvania joins the highest courts of ten other States that permit courts to order grandparent visitation even absent a judicial determination that visitation is necessary to avoid harm to the child. Those courts reject the proposition that the federal Due Process Clause precludes court-ordered visitation to grandparents unless the child has been, or is likely to be, harmed by the lack of visitation. Moreover, some of those courts have decided that

placing the burden on the grandparent to prove that visitation would be beneficial to the child sufficiently accounts for the "special weight" that *Troxel* requires be accorded to parental preferences. See, e.g., *Evans v. McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004) ("[The] special weight [that] must be given to a fit parent's determination as to the desirability of visitation with [grandparents] * * * can be accomplished by imposing on the [grandparent] the burden of proving that visitation by the [grandparent] is in the best interests of the child and by requiring that this be established by clear and convincing evidence.").

The highest courts in these States consider only whether visitation is in the "best interests" of the child. The courts typically make that determination by resorting to commonlaw or statutory multi-factor tests that do not require a showing of harm to the child. See Evans, 88 P.3d at 1096 ("best interests" standard sufficiently accounts for the "special weight" that must be given to fit parents' decisions); *In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (upholding a "best interest" standard in light of *Troxel*); *In re Adoption of C.A.*, 137 P.3d 318, 325 (Colo. 2006) (upholding a statutory "best interests" standard, because "*Troxel* did not require a standard of significant or substantial emotional harm to the child"); *Thomas v. Nichols-Jones*, 2006 Del. Lexis 515, *4-*5 (Del. 2006) (upholding application of best interests standard in light of *Troxel* where grandparent bears the burden of proof); *State v. Paillet*, 16 P.3d 962, 971 (Kan. 2001) (*Troxel* did not "call[] into question" a statutory standard permitting court-ordered visitation where there has been no finding of potential harm to the child); *Blakely v.*

Blakely, 83 S.W.3d 537, 543 (Mo. 2002) (upholding a statutory "best interests" standard, because *Troxel* does not "require[] courts to find unconstitutional on its face any statute granting grandparents visitation in the absence of a finding that the lack of such visitation will cause the child harm"); *Hamit v. Hamit*, 715 N.W.2d 512, 528 (Neb. 2004) (the statutory "best interests" standard survives *Troxel*); *Harrold v. Collier*, 836 N.E.2d 1165, 1172 (Ohio 2005) (upholding a multi-factor statutory "best interest" test and denying that *Troxel* requires a higher threshold showing); *Currey v. Currey*, 650 N.W.2d 273, 278-79 (S.D. 2002) (considering the effect of *Troxel* and applying a statutory "best interests" standard); *Brandon L. v. Moats*, 551 S.E.2d 674, 685 (W.Va. 2001) (upholding a statutory "best interests" standard in light of *Troxel*).

E. The Widespread Uncertainty Regarding The Circumstances Under Which A Court May Interfere With A Fit Parent's Constitutional Rights Requires This Court's Intervention

All fifty States have some kind of third-party visitation statute, and all continue to wrestle with the application of those statutes in light of *Troxel*. See App., *infra* at 87a-110a. The existing conflict shows no sign of abating, and "[t]he * * * years since *Troxel* have made abundantly clear that its narrow holding has done much to muddy the jurisprudential waters with regard to visitation." Meredith Ruston, "Splitting the Baby" in *Troxel v. Granville*, 14 J. Contemp. Legal Issues 347, 351 (2003). Indeed, in the wake of *Troxel*, twenty-eight state supreme courts have confronted whether the Fourteenth Amendment

requires that those statutes incorporate a harm threshold. See App., *infra*, at 87a-101a.[7]

The Supreme Court of Michigan agreed, remarking that, post-*Troxel*, "federal constitutional law in this area is now not as predictable as it was before." *DeRose*, 666 N.W.2d at 643. It falls to this Court to provide much-needed predictability by issuing a clear directive to the States as to what the Constitution requires. Absent this Court's guidance, parents, children, and grandparents seeking visitation will continue to bear the expense and disruption of continued litigation.

F. Protracted legal battles over grandparent visitation are unlikely to produce the sort of benefits that children need.

Georgia: Ga. Code Ann. § 19-7-3 gave grandparents the right to petition for visitation.

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[7] Of those States whose highest courts have not ruled since *Troxel* as to whether the Fourteenth Amendment mandates a harm requirement, two have pre-*Troxel* precedent requiring a showing of harm. Eight States have no published case law squarely addressing the federal constitutional question. In another nine States, intermediate appellate courts are the highest authority to rule. See *Dodd* v. *Burleson*, 932 So.2d 912, 920 (Ala. Civ. App. 2005); *McGovern* v. *McGovern*, 33 P.3d 506, 511-512 (Ariz. Ct. App. 2001); *McCune* v. *Frey*, 783 N.E.2d 752, 756 (Ind. App. 2003); *Vibbert* v. *Vibbert*, 144 S.W.3d 292, 294-295 (Ky. Ct. App. 2004); *Galjour* v. *Harris*, 795 So. 2d 350, 358 (La. Ct. App. 2001); *Koshiko* v. *Hanning*, 897 A.2d 866, 882 (Md. Ct. Spec. App.) cert. granted, 900 A.2d 751 (tbl.) (Md. 2006); *Ridenour* v. *Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995); *In re Paternity of Roger D.H.*, 641 N.W.2d 440, 445 (Wis. Ct. App. 2002).

Georgia's experience with its prior grandparent visitation statute is representative of what has happened in other states. In *Brooks v. Parkenson*, the child's maternal grandmother sought visitation under Ga. Code. Ann. Sec. 19-7-3, the 1988 version of Georgia statute. Visitation, denied by the trial court, had been opposed by both of the child's parents.

Pursuant to Sec. 19-7-3(a), grandparents had "the right to seek visitation of a minor grandchild in three ways: by filing an original action for visitation rights, by intervening in certain existing actions, including those where the custody of a minor child is in issue, or by proceeding where there has been an adoption in which the adopted child has been adopted by the child's blood relative or a stepparent." Sec. 3(c) also provided grandparent visitation "upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."

On appeal, the Georgia Supreme Court considered whether the statute was constitutional. First, the court examined the interest that are protected by the federal Constitution. Then, the court looked at the extent to which a state may infringe upon an interest that is protected by the constitution. Last, the court had to determine if the state statute in question was within the permissible scope of infringement.

As a matter of well-established constitutional law, and whether married, separated or divorced parents have a constitutional right to privacy. Inherent in which is the right to raise their children without undue interference by the state: "The

fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."

Therefore, the state can infringe only upon a showing of compelling circumstances: that the health or welfare of the child is threatened.

Grandparent Visitation Rights are not Ironclad

Protracted legal battles over grandparent visitation are unlikely to produce the sort of benefits that children need. By Gerald L. Nissenbaum and Stephen C. Maloney[8]

With the passage and signing in April of a newly revised Georgia statute providing for grandparent visitation with children, all 50 states now attempt to provide some form of grandparent visitation with children.

Several states, such as Alaska, Arkansas, Colorado and now Georgia, give grandparents standing to seek visitation when one or both parents are deceased or when the parents are divorced or separated. Some states, such as California, Hawaii, Illinois, Nevada and Wisconsin, provide relatives and unrelated third parties with standing to seek visitation in situations in which a parent is deceased, the parents are divorced or separated or a custody action is pending. Grandparents and other third parties have been granted standing to pursue

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[8] Article Abstracted

visitation when the child has resided with a grandparent or third party for a statutorily defined length of time, in such states as Minnesota, New Mexico, Pennsylvania and Wyoming.

In the past, many states, whether by statute or by case law, adopted the standard of "best interests of the child" to determine whether, and to what extent, grandparent visitation should occur.

Georgia's experience with its prior grandparent visitation statute is representative of what has happened in other states. In *Brooks v. Parkenson*, the child's maternal grandmother sought visitation under Ga. Code.Ann. Sec. 19-7-3, the 1988 version of Georgia statute. Visitation, denied by the trial court, had been opposed by both of the child's parents.

Pursuant to Sec. 19-7-3(a), grandparents had "the right to seek visitation of a minor grandchild in three ways: by filing an original action for visitation rights, by intervening in certain existing actions, including those where the custody of a minor child is in issue, or by proceeding where there has been an adoption in which the adopted child has been adopted by the child's blood relative or a stepparent." Sec. 3(c) also provide grandparent visitation "upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."

Constitutional Issues

On appeal, the Georgia Supreme Court considered whether the statute was constitutional. First, the court examined the interests that are

protected by the federal Constitution. Then, the court looked at the extent to which a state may infringe upon an interest that is protected by the constitution. Last, the court had to determine if the state statute in question was within the permissible scope of infringement.

As a matter of well-established constitutional law, and whether married, separated or divorced parents have a constitutional right to privacy. Inherent in which is the right to raise their children without undue interference by the state: "The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[9] Therefore, the state can infringe only upon a showing of compelling circumstances: that the health or welfare of the child is threatened.

For example, laws preventing female children under the age of 18 from selling magazines[10] or limiting the availability of sex material to children have been held constitutional.[11] On the other hand, citing the due process and equal protection clauses of the Fourteen Amendment and the Ninth Amendment's right to privacy, the U.S. Supreme Court has declared unconstitutional laws that made

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[9] *Santosky v. Kramer*, 445 U.S. 745, 753 (1982)

[10] *Prince v. Massachusetts*, 321 U.S. at 166

[11] *Ginsberg v. New York*, 390 U.S. 629 (1982)

the children of unwed father's wards of the state upon the death of the mother.[12]

Most state constitutions have similar protections. Rather than a mere preponderance of evidence, clear and convincing evidence of harm to the child is needed to support removal from the parent. In other words, any infringement of the right of parental control or removal can be sustained "only under the most compelling circumstances."[13] State infringement of these parental rights and interests is permissible only when the police power of the state must be used to protect a child's health and welfare or when the parental conduct would result in harm to the child.[14]

In Brooks, The Georgia Supreme Court held that the 1988 statute fell short "both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation can be ordered. There is little empirical evidence that grandparent visitation promotes a grandchild's health and welfare. Even if such studies were available, grandparent visitation can be court-ordered only "over a parent's objections on a showing that failing to do so would be harmful to the child." In response to *Brooks,* the Georgia Legislature enacted a new law, Ga. Code Ann. Sec. 19-7-1, et seq. Now grandparent visitation rights may be sought in Georgia only when a least one of the child's parents had died or the parents' rights have been terminated. Grandparents who fit into

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[12] *Stanley v. Illinois*, 406 U.S. 645,651-652 (1972)

[13] *In re: Suggs*, 249 Ga. 365,367 (1982)

[14] *Hawk v. Hawk*, 855 S.W. 2d 573, 580 (Tenn. 1993)

these limited circumstances can bring an original action or intervene in a seek visitation when the custody of a minor child is at issue, including cases in which there has been adoption by the child's blood relative or by a stepparent.

Taking helpful hints from its supreme court, the Georgia Legislature specified that there is no presumption in favor of grandparent visitation and that the law does not apply "where the parents of the minor child are not separated and the child is living with both of the parents." Regardless of the standards used in a jurisdiction, practical considerations influence the decision to pursue grandparent visitation.

First, counsel must advise the client that, apart from popular reference to "grandparent visitation statures" these laws are not intended or designed to provide emotional sustenance for the grandparent. The best interest of the grandparents is not the touchstone for application of these statutes.

It also is not enough to prove that grandparent visitation will enhance the child's emotional development. The grandparent must prove that, absent this visitation, the child will be harmed.[15]

These considerations appear to militate heavily against granting grandparent visitation in most circumstance. Even if there is a possibility that visitation would be granted, the grandparent must

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[15] *Child Custody & Visitation Law and Practice, Sec. 16.12[3] n..38 (1982 & 1994 Supp.)*

consider whether the process of proving harm to the child in the absence of grandparent visitation will do more harm to the child than refraining from seeking visitation. As a practical matter, grandparents may find that offering financial contribution to the child's support, for instance, could be a better way to persuade the custodial parent to allow access to the children.

A protracted battle over grandparent visitation is unlikely to achieve the salutary benefits desired for the child. Accordingly, such litigation should be undertaken only when, absent such visitation, there can be a clear showing of harm to the child and when the likely benefit to the child can be clearly predicted to outweigh the emotional cost of the process. The "best interests" baseline is more appropriate in mediating custody disputes between those whose existing rights to custody are of equal strength, such as divorcing parents. As the plurality recognized in *Troxel*: [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Moreover, a standard that simply requires a grandparent to argue for a child's "best interests," without a threshold showing of potential harm, would invite litigation—a process that is almost never in the best interests of the child. As at least five Justices in *Troxel* agreed, "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right

of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel*, 530 U.S. at 75 (plurality opinion) (quoting id. at 101 (Kennedy, J., dissenting)).

Parties to a dispute over childrearing almost always feel they have the child's best interests in mind. A malleable "best interests" standard encourages any grandparents dissatisfied with the level of interaction they currently have with a child to file suit in the hope that the judge they draw will agree that the child's situation could be made better through mandatory visitation. See *Rideout v. Riendeau*, 761 A.2d 291, 296 n.5 (Me. 2000) ("Broad room for debate [under a subjective "best interests" standard] means a broad and unpredictable array of possible outcomes in any custody contest. That fact encourages prolonged and expensive litigation and 'strategic behaviors' of the parents, neither of which usually benefits children.")

In summary, our family would love to bond with Jaylen and Javon and to continue a loving relationship with them because of our deep love for them. We know they are still emotionally in pain in losing their Mother and we would like to ease some of their pain. Our family has been emotionally scarred and deeply in pain by not being able to have visitation rights to see them.

We would like to make this appeal on the basis of love. This is a sad story, because no one is a winner. I missed my sister so much, but at the end, she was a fighter, I am speaking on behalf of Jaylen and Javon, because at the end of this story they had no voice.

Please grant us the privilege of having a relationship with Jaylen and Javon.

CONCLUSION

For the above aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Linda Harris
1000 Peachtree Industrial Boulevard
Suite 6-123
Suwanee, GA 30024
(678) 710-5625
Petitioner Pro Se

April 20, 2009

APPENDIX

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE
ATLANTA

Date: September 22, 2008

Linda Harris-Brunson
5405 Spotted Fawn Court
Suwanee, GA 30024

Case No. S08C1612

LINDA HARRIS-BRUNSON

—v.—

JAMES JENKINS

COURT OF APPEALS CASE NO. A08D0339

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO.: 06-A-06158-2

LINDA HARRIS-BRUNSON,
Plaintiff,

—VS—

JAMES JENKINS,
Defendant.

ORDER TRANSFERRING CASE

Findings of Fact

The Plaintiff in this case is the maternal aunt of the children and is a resident of Gwinnett County. The Defendant is the legal and biological father of the children and is a resident of the State of New York. The biological mother is deceased. On June 26, 2006, the Plaintiff filed a *Complaint For Determination of Child Custody* and *a Motion For Expedited Hearing*. The Court conducted a hearing in this matter on September 5, 2006, for the purpose of making a determination regarding the temporary custody of the minor children.

At the conclusion of this hearing, the Court awarded sole legal and physical custody of the minor children to the Defendant. The Defendant immediately returned to New York with the children following the September 5, 2006, hearing and has remained in New York with the children since that time. In January of 2007, the maternal grandparents, Jim Harris, Jr. and Margaret Harris, filed *a Complaint For Grandparents' Visitation Rights*. The Court thereafter conducted a hearing with respect to jurisdiction and the potential transfer of this case to new York. The Court has not issued a ruling in connection with the Complaint seeking visitation filed by the maternal grandparents.

Conclusions of Law

As stated above, this Court entered an Order Granting Temporary Custody to Defendant, in September of 2006, thereby making the "initial child custody determination" in this case as the term is defined in the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Pursuant to O.C.G.A. § 19-9-62(a), this Court maintains jurisdiction until it determines that neither the child nor the child's parents or any person acting as a parent has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships OR until it determines that neither the child nor the child's parents or any person acting as a parent resides in this state.

In the present case, the Defendant is the only surviving parent of the minor children. He currently resides in the State of New York, and the children

have resided with him in that state since September of 2006. They have attended school in the State of New York for approximately a year and a half while living with their father and have formed friendships and relationships in that state during this time period. The most substantial evidence relating to their care, protection, training, and personal relationships is available in the State of New York. Furthermore, neither the children nor any parent or any person acting as a parent as defined by the UCCJEA presently live in this State. Based on the foregoing, jurisdiction is no longer proper in the State of Georgia.

To the extent that one could argue that this Court continues to maintain jurisdiction in this case, the Court declines to exercise its jurisdiction. Pursuant to O.C.G.A. § 19-9-67, the Court finds that this is an inconvenient forum under the circumstances and that the State of New York is a more appropriate forum in which to litigate this case. Based on the foregoing, it is proper to transfer this case to the Supreme Court of the State of New York, County of Bronx for disposition. The Court hereby orders said transfer and directs the Clerk of the Court to waive all costs of the transfer of this case.

SO ORDERED, this 19 day of March, 2008.

/S/ DEBRA TURNER
DEBRA TURNER, Judge
Superior Court of Gwinnett County

Copies to: Parties and/or attorneys of record

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, May 15, 2008

The Court of Appeals hereby passes the following order:

APPLICATION NO. A08D0339

LINDA HARRIS-BRUNSON

—v.—

JAMES JENKINS

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

96029

06A06158

[COURT OF APPEALS OF THE
STATE OF GEORGIA SEAL]

Court of Appeals of the
State of Georgia

Clerk's Office, Atlanta

May 15, 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ WILLIAM L. [ILLEGIBLE]

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION
NO. 06A-06158-2

LINDA HARRIS-BRUNSON,

Plaintiff,

—v.—

JAMES JENKINS,

Defendant.

INTERVENOR'S COMPLAINT FOR GRANDPARENTS' VISITATION RIGHTS

The Intervenors, JIM HARRIS, JR. and MARGARET HARRIS, show that they are entitled to intervene as grandparents under O.C.G.A. § 19-7-3(b) in this case involving custody of children of a deceased parent, and states their claim for reasonable visitation rights as follows:

1.

The Plaintiff has signed an Acknowledgment of Service and is attached hereto as Exhibit "A". Defendant can be served at 1141 Tiffany Street, Apartment C, Bronx, New York, 10459.

2.

The minor children, Jaylen Jenkins, born October 18,1998 and Javon Jenkins, born May 16, 2000, are presently in the temporary physical legal custody of the Defendant, James Jenkins. The natural mother of the children is the child of the intervenors and is deceased, having died July 17, 2006. Temporary custody was granted to the Defendant on September 5, 2006.

3.

The health and welfare of the children will be harmed unless such visitation is granted because the relationship between the grandparents and the children is well established and the absence of the relationship will be detrimental to the children's emotional well being.

4.

The best interest of the children will be served by such visitation because it is in their best interest to have a continuing and nurturing relationship with their grandparents. The children have had an abiding relationship with their grandparents throughout their life, with their grandmother living with her daughter and the children in this case for a period of four (4) years. Prior to that, the grandmother lived in the apartment building next door to the children for the previous three (3) years.

5.

The grandfather intervenor has regularly visited with his grandchildren each year since their birth for a period of approximately two (2) weeks each

year. The grandfather has made a routine of almost nightly phone calls to the children since their birth to bid them goodnight.

6.

Multiple attempts have been made to reach the grandchildren to no avail. The temporary custodian of the children, the children's father, has not allowed any contact with the children in this case.

WHEREFORE, Intervenors pray:

(a) Their intervention be allowed;

(b) That they be granted reasonable visitation rights; and

(c) That they have such additional relief as the Court may consider equitable and appropriate.

Respectfully submitted this 19th day of the January, 2007.

/S/ JAN V. HINSON

Jan V. Hinson
Attorney for Plaintiff and Intervenors
Georgia Bar No: 356817

The Law Offices of Jan V. Hinson, P.C.
11330 Lakefield Drive
Building II, Suite 200
Duluth, Georgia 30097
770-814-4130